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# EU MERGER CONTROL

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On 21 September 1990, the EC Merger Regulation entered into force,<sup>2</sup> introducing into EU competition law a legal framework for the systematic review of mergers, acquisitions, and other forms of concentration. The EC Merger Regulation has been transformative, effecting significant and permanent change to EU competition law and practice. This chapter contains a short introduction to the principal provisions of the EC Merger Regulation and identifies certain of the most important developments in its recent application.

## I INTRODUCTION

Adopted in 1989, the EC Merger Regulation is intended to ‘permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations.’<sup>3</sup> The EC Merger Regulation contains the legal framework and principal provisions of EU merger control. Responsibility for the enforcement of the EC Merger Regulation rests with the Competition Commissioner, who oversees the European Commission’s Directorate-General for Competition (DG COMP). Since October 2014, Margrethe Vestager has served as Competition Commissioner.

At the time of its adoption, the Commission also approved an Implementing Regulation,<sup>4</sup> which is concerned largely with procedural matters and, among other things, contains Form

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1 Nicholas Levy and Patrick Bock are partners at Cleary Gottlieb Steen & Hamilton LLP. The authors have drawn on material contained in Nicholas Levy and Christopher Cook, *European Merger Control Law* (Matthew Bender & Co., 2016).

2 The EC Merger Regulation was adopted in 1989 and came into force in 1990. Council Regulation 4064/89 of 21 December 1989, on the control of concentrations between undertakings, 1990 O.J. L257/13; with amendments introduced by Council Regulation 1310/97, 1997 O.J. L180/1, corrigendum 1998 O.J. L40/17. In 2004, a revised and significantly recast version of the EC Merger Regulation came into force. Council Regulation 139/2004 of 20 January 2004, on the control of concentrations between undertakings, 2004 O.J. L24/1.

3 Recital 6, EC Merger Regulation.

4 Commission Regulation 2367/90 on the notification time limits and hearings provided for in Council Regulation 4064/89 on the control of concentrations between undertakings, 1990 O.J. L219/5, as amended by Commission Regulation 3384/94, 1994 O.J. L377/1, by Commission Regulation 447/98, 1998 O.J. L61/1, and Commission Regulation 802/2004 implementing Council Regulation 139/2004, 2004 O.J. L133/1, consolidated version available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:133:0001:0039:EN:PDF>.

CO and Short Form, the forms prescribed for the notification of reportable transactions.<sup>5</sup> To facilitate understanding of the EC Merger Regulation and to provide transparency in its practice, application, and interpretation, the Commission has adopted and kept updated a number of interpretative notices and guidelines that address a range of jurisdictional,<sup>6</sup> substantive,<sup>7</sup> and procedural matters<sup>8</sup> and are designed to provide 'maximum transparency and legal certainty ... informing the companies and the public about our procedures and at the same time offer[ing] us the opportunity to adapt our policies over time in order to reflect legal and economic developments as they come along.'<sup>9</sup>

The scope, purpose and objectives of the EC Merger Regulation were articulated at the time of its adoption in 1989 by Sir Leon Brittan QC, subsequently Lord Brittan, then Competition Commissioner:

*My task is to discover which mergers stifle competition. They will be stopped. All others will proceed. All mergers with a Community dimension will benefit from the one-stop-shop regime. We have clarified and simplified the law in an area which was full of uncertainties and complications. A large European merger had to be hawked around several European capitals for approval and consideration also had to be given to the precise scope of Articles [101] and [102] [TFEU] in this field, on the basis of two judgments of the European Court. Now we have the policy right and we have clarified*

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5 Form CO relating to the notification of a concentration pursuant to Council Regulation 139/2004, 2004 O.J. L133/1; and Short Form CO for the notification of a concentration pursuant to Council Regulation 139/2004, 2004 O.J. L133/1.

6 The Consolidated Jurisdictional Notice provides guidance on jurisdictional issues concerning the scope of application of the EC Merger Regulation. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2008 O.J. C95/1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>.

7 The Commission Notice on the definition of the relevant market for purposes of Community competition law provides guidance on the Commission's approach to product and geographic market definition. Commission Notice on the definition of the relevant market for the purposes of Community competition law, 1997 O.J. C372/5, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML). In 2004, the Commission adopted Guidelines on the appraisal of horizontal mergers, which explain the analytical framework applied to the assessment of concentrations between competitors (the Horizontal Mergers Guidelines). Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. C31/05, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF>. In November 2007, the Commission adopted Guidelines on the appraisal of non-horizontal mergers, which explain the analytical framework applied to the assessment of concentrations involving companies active in vertical or related markets (the Non-Horizontal Mergers Guidelines). Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008 O.J. C265/6, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF>.

8 The Commission Best Practices Guidelines on the conduct of merger control proceedings explain matters relevant to the day-to-day handling of merger cases and the Commission's relationship with the merging parties and interested third parties (the Best Practices Guidelines). DG Competition Best Practice Guidelines on the conduct of EC merger control proceedings, available at <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>.

9 Mario Monti, former Competition Commissioner, The Main Challenges for a New Decade of EC Merger Control, 10th Anniversary Conference, Brussels, 15 September 2000 (Commission Press Release SPEECH/00/311).

*the procedures and the substantive rules. The Community's single market now has a proper system of merger law and policy to ensure that its benefits are passed on to consumers and will lead to the enhancement of competitive industry.*<sup>10</sup>

In recent years, the Commission has emphasised the EC Merger Regulation's 'fundamental objective of protecting consumers against the effects of monopoly power (higher prices, lower quality, lower production, less innovation)',<sup>11</sup> and has underlined the common features of EU and US merger control, in particular the protection of consumer welfare and the pursuit of economic efficiencies:

*[T]he goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market .... Our merger policy aims at preventing the creation or strengthening of dominant positions through mergers or acquisitions. Such a market power produces competitive harm, which manifests either directly through higher post-merger prices or reduced innovation or, indirectly, through the elimination of competitors, leading ultimately to the same negative results in terms of prices or innovation. Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare.*<sup>12</sup>

The EC Merger Regulation has evolved from 'one of the most dynamic domains in the competition portfolio'<sup>13</sup> into a relatively 'mature area of enforcement',<sup>14</sup> 'a well-oiled machine which draws on many years of experience'.<sup>15</sup>

## II YEAR IN REVIEW

In recent years, the Commission's application of the EC Merger Regulation has become more interventionist: several concentrations have been prohibited or abandoned in the face of objections, others have been subject to wide-ranging commitments, and the Commission has

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10 Sir Leon Brittan QC, subsequently Lord Brittan, *The Law and Policy of Merger Control in the EEC*, [1990] 5 E.L.Rev. 351 and 357.

11 XXXIst Report on Competition Policy (2001), paragraph 252.

12 Mario Monti, former Competition Commissioner, 'The Future for Competition Policy in the European Union', speech at Merchant Taylor's Hall, 9 July 2001 (Commission Press Release SPEECH/01/340 of 10 July 2001). See too 'Mario Monti, Europe's Merger Monitor', *The Economist*, 9 November 2002 ('Preserving competition is not, however, an end in itself. The ultimate policy goal is the protection of consumer welfare. By supporting the competitive process, the EC Merger Regulation plays an important role in guaranteeing efficiency in production, in retaining the incentive for enterprises to innovate, and in ensuring the optimal allocation of resources. Europe's consumers have been the principal beneficiaries of the Commission's enforcement of the regulation, enjoying lower prices and a wider choice of products and services as a result').

13 Joaquín Almunia, former Competition Commissioner, 'The Past and the Future of Merger Control in the EU', Address at GCR Conference, Brussels, 28 September 2010 (Commission Press Release SPEECH/10/486).

14 Joaquín Almunia, 'Competition Policy: State of Play and Future Outlook', Address at European Competition Day, Brussels, 21 October 2010 (Commission Press Release SPEECH/10/576).

15 Joaquín Almunia, 'Policy Objectives in Merger Control', Fordham Competition Conference, New York, 8 September 2011 (Commission Press Release SPEECH/11/561).

explored ways in which the EC Merger Regulation's jurisdictional scope might be expanded, applied theories of harm that had not been actively pursued for several years, enforced the EC Merger Regulation's procedural rules more rigorously, and routinely required upfront buyers in remedies cases. The following 10 developments and trends can be observed.

First, as to the jurisdictional scope of the EC Merger Regulation, the Commission has resisted applications from certain Member State agencies to cede jurisdiction over transactions having cross-border effects,<sup>16</sup> in particular, those affecting the media and telecommunications sectors, where a number of national agencies have unsuccessfully petitioned the Commission to review concentrations impacting their respective national markets.<sup>17</sup> In June 2013, the Commission published a consultative paper seeking comments on a proposal to expand the jurisdictional scope of the EC Merger Regulation to capture the acquisition of non-controlling minority shareholdings.<sup>18</sup> A year later, in July 2014, the Commission issued a White Paper<sup>19</sup> and a Staff Working Document<sup>20</sup> confirming its intention to propose expanding the jurisdictional scope of the EU Merger Regulation to capture the acquisition of non-controlling minority shareholdings. Any such expansion could have significant consequences for the EC Merger Regulation's scope of application<sup>21</sup> and, shortly after her appointment as Competition Commissioner, Margrethe Vestager suggested that the 'balance between the concerns that this issue raise and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further.'<sup>22</sup> In

16 See, e.g., Alexander Italianer, 'Best Practices for Antitrust Proceedings and the Submission of Economic Evidence and the Enhanced Role of the Hearing Officer', speech at OECD Competition Committee Meeting, Paris, 18 October 2011.

17 See, e.g., *Telefónica Deutschland/E-Plus*, Case COMP/M.7018, Commission decision of 2 July 2014; *Liberty Global/Ziggo*, Case COMP/M.7000, Commission decision of 10 October 2014; *Orange/Jazztel*, Case COMP/M.7421, Commission decision of 26 January 2015; *Altice/PT Portugal*, Case COMP/M.7499, Commission decision of 20 April 2015; and *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 4 December 2015.

18 Towards more effective EU merger control, Commission Staff Working Document of 20 June 2013 (Staff Working Document 2013). See too Mergers: Commission consults on possible improvements to EU merger control in certain areas, Commission Press Release IP/13/584 of 20 June 2013.

19 White Paper, Towards more effective EU merger control, COM(2014) 449, 9 July 2014 (White Paper). See too Carles Esteve-Mosso, Deputy Director-General for Mergers, DG COMP, EU Merger Control: The Big Picture, speech at the Sixth Annual GCR Conference, Brussels, 12 November 2014, p. 8, available at: [http://ec.europa.eu/competition/speeches/text/sp2014\\_06\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2014_06_en.pdf).

20 Commission Staff Working Document, Towards more effective EU merger control, 9 July 2014, SWD(2014) 221 (Staff Working Document 2014).

21 See, e.g., Francisco Enrique González-Díaz, *Minority Shareholdings and Creeping Acquisitions: The European Union Approach*, 2011 Fordham Comp. L. Inst. 423 (Barry E. Hawk, ed. 2012); and Nicholas Levy, 'Expanding EU Merger Control to Non-Controlling Minority Shareholdings: A Sledgehammer to Crack a Nut?', *CPI Antitrust Chronicle No. 1*, December 2014.

22 Margrethe Vestager, Competition Commissioner, 'Thoughts on Merger Reform and Market Definition', Keynote address at Studienvereinigung Kartellrecht Brussels, 12 March 2015 ('What have we learned from the replies? While many acknowledge that there may be an enforcement gap, there is widespread concern regarding the proportionality of the White Paper's approach to closing the gap. Is it balanced? Will it work well? Against this background, my conclusion is that the balance between the concerns that this issue raise and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further').

2016, the Commission consulted on a new and different proposal designed to expand the jurisdictional scope of the EC Merger Regulation to capture high-value transactions that do not meet the revenue-based turnover thresholds.<sup>23</sup>

Second, the Commission has devoted increasing resources to more complex cases, reducing the length of unconditional approval decisions concerning non-problematic transactions and exploring ways to simplify notification requirements in respect of such cases. In a package of reforms adopted in 2013, the Commission expanded the definition of concentrations eligible for notification under the simplified procedure to ‘reduce the administrative burden and cost for business at a time when it needs it most.’<sup>24</sup> In 2016, the Commission consulted on further changes designed to permit a larger number of concentrations to be notified under the simplified procedure.<sup>25</sup>

Third, as to its enforcement practice, between 2012 and 1 May 2017, the Commission prohibited six concentrations,<sup>26</sup> conditionally approved a number of others on the basis of far-reaching remedies,<sup>27</sup> and led a number of companies to abandon concentrations to avoid likely prohibition decisions,<sup>28</sup> provoking suggestions that it had become more interventionist.<sup>29</sup> The Commission has maintained its focus on unilateral effects, showing greater readiness to focus on the competition that will be lost through a merger,<sup>30</sup> rather than the post-transaction

23 Evaluation of procedural and jurisdictional aspects of EU merger control, October 2016, available at [http://ec.europa.eu/competition/consultations/2016\\_merger\\_control/consultation\\_document\\_en.pdf](http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf).

24 Mergers: Commission Adopts Package Simplifying Procedures Under the EU Merger Regulation – Frequently Asked Questions, 5 December 2013, Commission MEMO IP/13/1098.

25 Evaluation of procedural and jurisdictional aspects of EU merger control, October 2016, available at [http://ec.europa.eu/competition/consultations/2016\\_merger\\_control/consultation\\_document\\_en.pdf](http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf).

26 *Deutsche Börse/NYSE Euronext*, Case COMP/M.6166, Commission decision of 1 February 2012; *UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2013; *Ryanair/Aer Lingus (III)*, Case COMP/M.6663, Commission decision of 27 February 2013; *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 11 May 2016; *Deutsche Börse/London Stock Exchange Group*, Case COMP/M.7995, Commission decision of 29 March 2017, not yet published; and *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia*, Case COMP/M.7878, Commission decision of 5 April 2017, not yet published.

27 See, e.g., *Südzucker/ED&F MAN*, Case COMP/M.6286, Commission decision of 16 May 2012; *Universal Music Group/EMI Music*, Case COMP/M.6458, Commission decision of 21 September 2012; *Outokumpu/Inoxum*, Case COMP/M.6471, Commission decision of 7 November 2012; and *Hutchison 3G Austria/Orange Austria*, Case COMP/M.6497, Commission decision of 12 December 2012.

28 See, e.g., *TeliaSonera/Telenor/JV*, Case COMP/M.7419, withdrawn on 11 September 2015, Commission Press Release STATEMENT/15/5627 of 11 September 2015 (parties abandoned the concentration when it became clear the Commission would not accept commitments offered to secure approval and would instead prohibit the transaction); and *Halliburton/Baker Hughes*, Case COMP/M.7477, withdrawn on 2 May 2016, Commission Press Release STATEMENT/16/1642 of 2 May 2016 (parties abandoned the transaction after the Commission raised objections and the US Department of Justice made clear it would seek to enjoin it from closing).

29 Joaquín Almunia, Merger Review: Past Evolution and Future Prospects, 2 November 2012 (Commission Press Release SPEECH/12/773) (‘I am often asked why the Commission is raising hurdles against the creation of large European companies; why Brussels is not supporting ‘European champions.’ I am always a bit surprised by such remarks – and by their dogged reiteration – because they do not correspond at all to the facts. So, let’s recognize the facts: it is simply not true that the Commission is putting the brakes on the legitimate efforts of Europe’s firms to scale up. This is a thing that anyone can verify reading the newspapers or the Official Journal’).

30 See, e.g., *Syniverse/MACH*, Case COMP/M.6690, Commission decision of 29 May 2013.

market shares. In 2013, the Commission prohibited for the first time a transaction that raised unilateral effects concerns, but might not have been readily susceptible to challenge under the dominance test contained in the original version of the EC Merger Regulation.<sup>31</sup> In 2015 and 2016, Commissioner Vestager appeared to reverse the policy of her predecessor, who had approved four-to-three mergers in the telecommunications sector,<sup>32</sup> by causing the abandonment of a four-to-three transaction between two Danish telecommunications operators,<sup>33</sup> prohibiting a four-to-three transaction between two UK operators,<sup>34</sup> and approving a transaction between two major Italian telecommunications operators only after the merging companies agreed to divest sufficient assets to facilitate the establishment of a new market operator.<sup>35</sup> In other cases, Commissioner Vestager had required wide-ranging remedies to address coordinated effects concerns<sup>36</sup> and conglomerate effects concerns<sup>37</sup> after several years in which neither theory of harm had been actively pursued.

Fourth, the Commission has continued to apply sophisticated quantitative tools,<sup>38</sup> to engage in economic analysis of its own,<sup>39</sup> and to place increasing reliance on internal business planning documents. Among other things, the package of reforms adopted in 2013 revised Form CO to encourage notifying parties to provide a description of quantitative economic data collected and stored in the ordinary course of business operations<sup>40</sup> and expanded the range of internal documents that must be provided with notifications.<sup>41</sup> These changes to Form CO have been supplemented by the Commission's increasing readiness to request large numbers of internal documents during its administrative procedure.<sup>42</sup> The Commission's

31 *UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2013. Overturned on appeal. *United Parcel Service v. Commission (UPS)*, Case T-194/13, not yet reported.

32 *Hutchison 3G Austria/Orange Austria*, Case COMP/M.6497, Commission decision of 12 December 2012; *Hutchison 3G UK/Telefónica Ireland*, Case COMP/M.6992, Commission decision of 28 May 2014; and *Telefónica Deutschland/E-Plus*, Case COMP/M.7018, Commission decision of 2 July 2014.

33 *TeliaSonera/Telenor/JV*, Case COMP/M.7419, withdrawn on 11 September 2015.

34 *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 11 May 2016.

35 *Hutchison 3G Italy/WIND/JV*, Case COMP/M.7758, Commission decision of 1 September 2016.

36 *AB InBev/SABMiller*, Case COMP/M.7881, Commission decision of 24 May 2016, not yet published.

37 *Dentsply/Sirona*, Case COMP/M.7822, Commission decision of 25 February 2016; *Worldline/Equens/Paysquare*, Case COMP/M.7873, Commission decision of 20 April 2016; and *Microsoft/LinkedIn*, Case COMP/M.8124, Commission decision of 6 December 2016.

38 See, e.g., *Hutchison 3G Austria/Orange Austria*, Case COMP/M.6497, Commission decision of 12 December 2012, paragraph 314 (Commission relied on upwards pricing pressure model to predict a concentration's effect on prices). See too Alison Oldale and Jorge Padilla, 'EU Merger Assessment of Upward Pricing Pressure: Making Sense of UPP, GUPPI and the Like', [2013] 4(4) JCLP, pp. 375–381; Stefan Thomas, 'Close Competitors in Merger Review', [2013] 4(5) JCLP, pp. 391–401; and Enrique Andreu, Jorge Padilla, and Nadine Watson, 'The Economics of the UPS/TNT Case Revisited: Implications for the Future', *Competition Policy International*, July 2015.

39 See, e.g., *Universal Music Group/EMI Music*, Case COMP/M.6458, Commission decision of 21 September 2012, Annex I, paragraphs 1–44 (Commission obtained three-year sales data covering 14 EU countries from major digital music platforms and recorded music companies to empirically test whether larger recorded music companies were able to extract better commercial terms from platforms, concluding that 'the results indicate that there is a positive relationship between the size of a recorded music company's repertoire and the wholesale price it negotiates with digital customers').

40 Introduction, paragraph 1.8, Form CO.

41 Section 5.4, Form CO.

42 See, e.g., *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 11 May 2016 (notifying parties submitted over 300,000 internal documents, which the Commission reviewed to support



focus on detailed economic data and analysis, together with the more systematic review of internal business planning documents, has tended to lengthen the merger clearance timetable, in particular in complex Phase II cases.<sup>43</sup>

Fifth, the Commission has expanded its consideration of effects on innovation competition beyond the pharmaceuticals sector<sup>44</sup> and has introduced new theories of harm aimed at capturing negative effects of concentrations on overall innovation, outside individual product markets. In 2015, in *Novartis/GlaxoSmithKline Oncology Business*, the Commission expanded its analysis into merging parties' research projects, taking under review even products in the early stages of development;<sup>45</sup> in *General Electric/Alstom*, the Commission was concerned that, by removing an important innovator, the transaction would reduce 'the overall competitive pressure on the remaining competitors, with a reduction in the overall incentives to invest significantly in innovation';<sup>46</sup> and, in *Dow/DuPont*,<sup>47</sup> the Commission was concerned that the transaction would reduce the parties' innovation incentives, resulting in reduced innovation competition in several 'innovation spaces' as well as at the industry level overall. The Commission's view that innovation concerns do not need to be tied to harm in any specific market<sup>48</sup> has been controversial and some commentators have been concerned by the lack of clear conditions and criteria for the innovation theory to apply.<sup>49</sup>

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its conclusion that Three and O2 competed closely with each other); and *Hutchison 3G Italy/WIND/IV*, Case COMP/M.7758, Commission decision of 1 September 2016 (WIND submitted over 1 million internal documents, which the Commission analysed to determine whether the merging companies were close competitors).

43 In 2012–2014 the average length of Phase II cases was 148 working days, ranging from 105 days (*UTC/Goodrich*, Case COMP/M.6410, Commission decision of 26 July 2012) to 133 days (*Syniverse/Mach*, Case COMP/M.6690, Commission decision of 29 May 2013) to 147 days (*Liberty Global/Ziggo*, Case COMP/M.7000, Commission decision of 10 October 2014) to 160 days (*UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2014) to 172 days (*Telefónica Deutschland/E-Plus*, Case COMP/M.7018, Commission decision of 2 July 2014).

44 See, e.g., *Pfizer/Pharmacia*, Case COMP/M.2922, Commission decision of 27 February 2003, paragraph 22; and *Novartis/GlaxoSmithKline Oncology Business*, Case COMP/M.7275, Commission decision of 28 January 2015, paragraphs 84–94.

45 *Novartis/GlaxoSmithKline Oncology Business*, Case COMP/M.7275, Commission decision of 28 January 2015.

46 *General Electric/Alstom (Thermal Power – Renewable Power & Grid Business)*, Case COMP/M.7278, Commission decision of 8 September 2015.

47 Case COMP/M.7932, Commission decision of 27 March 2017, not yet published. See Mergers: Commission clears merger between Dow and DuPont, subject to conditions, Commission Press Release IP/17/772 of 27 March 2017.

48 Matthew Newman, 'Dow-DuPont merger remedy reflects EU's growing focus on innovation, Mosso says', MLex Insight, 28 March 2017 ('In some cases, you can know in which product the companies are innovating and you can identify an overlap in the future. But there could be situations where we don't know the outcome of the innovation process, but we nevertheless know the innovation process would be harmed as a result of the merger').

49 See, e.g., Nicolas Petit, 'Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?', International Center for Law & Economics, Antitrust & Consumer Protection Research Program White Paper, 2017, p. 8 (Petit refers to the theory of harm as the 'Significant Impediment to Industry Innovation' (SIII) theory, characterising it as a novelty that exceeds the scope of the current European merger control framework. The author considers that innovation concerns in previous cases were always anchored to a specific product market, whether current or future).

Sixth, as to procedure, the Commission has in recent years shown an increasing readiness to enforce its procedural rules and to discipline companies that do not observe those rules. In May 2017, the Commission fined Facebook €110 million for providing incorrect or misleading information during its 2014 investigation of its acquisition of WhatsApp. The magnitude of this fine dwarfed penalties imposed in the past for similar infractions and, as Competition Commissioner Vestager made clear at the time, ‘sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information.’<sup>50</sup> Also in May 2017, the Commission sent Altice a statement of objections alleging that, in connection with its 2015 acquisition of PT Portugal, it had been ‘in a position to exercise decisive influence over PT Portugal before notification or clearance of the transaction, and ... in certain instances [had] actually exercised decisive influence over PT Portugal’.<sup>51</sup>

Seventh, as to remedies, the Commission has maintained a rigorous approach towards their evaluation and implementation, including by subjecting remedy proposals to detailed and exacting review<sup>52</sup> and strengthening the role of monitoring trustees in the package of reforms adopted in late 2013.<sup>53</sup> Most significantly perhaps, the Commission has required upfront buyer commitments in an increasing number of cases. In 2014, all five Phase II commitments decisions included upfront buyer provisions (*INEOS/Solvay/JV*,<sup>54</sup> *Hutchison 3G UK/Telefónica Ireland*,<sup>55</sup> *Telefónica Deutschland/E-Plus*,<sup>56</sup> *Liberty Global/Ziggo*,<sup>57</sup> and *Huntsman Corporation/Equity Interests held by Rockwood Holdings*<sup>58</sup>), as did three of the seven Phase II commitments decisions rendered in 2015 (*Zimmer/Biomet*,<sup>59</sup> *Orange/Jazztel*<sup>60</sup> and *General Electric/Alstom*<sup>61</sup>), and three of the six Phase II commitments decisions rendered in 2016 (*Staples/Office Depot*,<sup>62</sup> *Ball/Rexam*<sup>63</sup> and *Liberty Global/BASE Belgium*<sup>64</sup>). The incidence of Phase I commitments decisions including upfront buyer provisions has also increased.<sup>65</sup> Additionally, as the Commission’s scrutiny of

50 *Facebook/WhatsApp*, Case COMP/M.8228, Commission Press Release IP/17/1369 of 18 May 2017.

51 *Altice/PT Portugal*, Case COMP/M.7499, Commission Press Release IP/17/1368 of 18 May 2017.

52 See, e.g., *Outokumpu/Inoxum*, Case COMP/M.6471, Commission decision of 7 November 2012, paragraphs 966 et seq.

53 Model Text for Divestiture Commitments, available at [http://ec.europa.eu/competition/mergers/legislation/template\\_commitments\\_en.pdf](http://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf).

54 Case COMP/M.6905, Commission decision of 8 May 2014.

55 Case COMP/M.6992, Commission decision of 28 May 2014.

56 Case COMP/M.7018, Commission decision of 2 July 2014.

57 Case COMP/M.7000, Commission decision of 10 October 2014.

58 Case COMP/M.7061, Commission decision of 10 September 2014.

59 Case COMP/M.7265, Commission decision of 30 March 2015.

60 Case COMP/M.7421, Commission decision of 19 May 2015.

61 Case COMP/M.7278, Commission decision of 8 September 2015.

62 Case COMP/M.7555, Commission decision of 10 February 2016.

63 Case COMP/M.7567, Commission decision of 15 January 2016.

64 Case COMP/M.7637, Commission decision of 4 February 2016.

65 See, e.g., *Boehringer Ingelheim/Sanofi Animal Health Business*, Case COMP/M.7917, Commission decision of 9 November 2016, not yet published; *Merck/Sigma-Aldrich*, Case COMP/M.7435, Commission decision of 15 June 2015; *NXP Semiconductors/Freescale Semiconductor*, Case COMP/M.7585, Commission decision of 17 September 2015; *Holcim/Lafarge*, Case COMP/M.7252, Commission decision of 15 December 2014; *CrownHoldings/Mivisa*, Case COMP/M.7104, Commission decision of 14 March 2014; and *IMS Health/Cegedim Business*, Case COMP/M.7337, Commission decision of 19 December 2014.

divestment packages has increased, requirements for divestments that extend beyond the strict competition concerns identified in order to enhance the viability and competitiveness of the divestment business have become more common.<sup>66</sup>

Eighth, as to the defences available under the EC Merger Regulation, the Commission approved two transactions on the basis of the ‘failing firm’ defence, including *Aegean/Olympic (II)*,<sup>67</sup> which had been prohibited in 2011, and started to show greater willingness to take positive account of efficiencies,<sup>68</sup> including in *FedEx/TNT Express*.<sup>69</sup>

Ninth, as to judicial review, in *Cisco and Messagenet*, which concerned an application to annul a Phase I unconditional approval decision (*Microsoft/Skype*<sup>70</sup>), the General Court rejected the applicants’ submission that the Commission was subject to a higher standard when it decided against opening a Phase II investigation,<sup>71</sup> and confirmed that the Commission was subject to an identical standard of judicial review irrespective of whether it approves concentrations in Phase I or Phase II, namely a balance of probabilities standard.<sup>72</sup> In 2015, the General Court<sup>73</sup> upheld the Commission’s prohibition of the then-contemplated combination of Deutsche Börse and NYSE/Euronext,<sup>74</sup> confirming the Commission’s broad discretion concerning the types of evidence that need be adduced to support its findings.<sup>75</sup> In 2017, the General Court annulled a Commission decision prohibiting the acquisition by United Parcel Service (UPS) of a rival express delivery services provider, TNT Express NV

66 See, e.g., *General Electric/Alstom*, Case COMP/M.7278, Commission decision of 8 September 2015, paragraphs 1927–1975; *Teva/Allergan Generics*, Case COMP/M.7746, Commission decision of 10 March 2016, not yet published; and *Dow/DuPont*, Case COMP/M.7746, Commission decision of 10 March 2016, not yet published.

67 Case COMP/M.6796, Commission decision of 9 October 2013.

68 See, e.g., *UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2013; and *Deutsche Börse/NYSE Euronext*, Case COMP/M.6166, Commission decision of 1 February 2012, paragraphs 1145–1342.

69 Case COMP/M.7630, Commission decision of 8 January 2016, paragraphs 498–588 and 776–804.

70 Case COMP/M.6281, Commission decision of 10 October 2011.

71 *Cisco Systems Inc and Messagenet SpA v. Commission (Cisco Systems and Messagenet)*, Case T-79/12 EU:T:2013:635, paragraph 43 (applicants had contended that the Commission was required ‘to show beyond reasonable doubt that a concentration does not give rise to any competition concerns’).

72 *Cisco Systems and Messagenet*, *supra*, paragraphs 45–50, at paragraph 46 (‘the standard of proof is no higher for decisions adopted under Article 6 of Regulation No 139/2004 than those adopted under Article 8 of that Regulation’). Advocate General Kokott had previously advocated a standard of proof ‘beyond a reasonable doubt’ for Phase I decisions. See Opinion of Advocate General Kokott in *Bertelsmann and Sony*, Case C-413/06 P EU:C:2007:790, paragraph 211 (‘This particularly high standard is known principally in the field of criminal and quasi-criminal proceedings. In merger control proceedings it is applicable only in the preliminary phase (Phase I), to compensate for the fact that at that stage the investigation of a concentration is merely a summary one. At that stage, ‘serious doubts’ as to the compatibility of the concentration with the common market will only prevent its being cleared too quickly and force the Commission to make a more extensive investigation in a formal procedure (Phase II)’).

73 *Deutsche Börse AG v. Commission (Deutsche Börse)*, Case T-175/12 EU:T:2015:148.

74 Case COMP/M.6166, Commission decision of 1 February 2012.

75 *Deutsche Börse*, *supra*, paragraph 132 (General Court held that ‘there is no need to establish a hierarchy between ‘non-technical evidence’ and ‘technical evidence,’ confirming that ‘the Commission’s task [is] to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation,’ prioritising certain items of evidence and discounting others).

(TNT), because the Commission was found to have infringed UPS's rights of defence by relying on a version of an econometric model that had not been fully disclosed to UPS during the administrative procedure.<sup>76</sup>

Tenth, collaboration between the Commission and other antitrust agencies around the world has continued to deepen<sup>77</sup> and instances of disagreement have remained infrequent. Within Europe, however, tensions emerged in 2014 between the Commission and certain Member State agencies concerning the Commission's approval of a number of four-to-three concentrations impacting the telecommunications sector.<sup>78</sup> Shortly after her appointment, Commissioner Vestager affirmed the Commission's commitment to 'a strong competition culture [that] keep[s] protectionism at bay',<sup>79</sup> recognising that antitrust enforcement often serves wider political goals, but maintaining that individual cases are never subject to political interference.<sup>80</sup>

### III THE MERGER CONTROL REGIME

The EC Merger Regulation is based on four main principles: (1) the exclusive competence of the Commission to review concentrations of EU dimension; (2) the mandatory notification of such concentrations; (3) the consistent application of market-oriented, competition-based criteria; and (4) the provision of legal certainty through timely decision making. The principal provisions of the EC Merger Regulation are summarised below:

The EC Merger Regulation applies to concentrations, i.e., lasting changes in control. The concept of a concentration includes mergers, acquisitions, and the formation of jointly controlled, autonomous, full-function joint ventures. The concept of control is defined as the possibility to exercise 'decisive influence.'

All concentrations that meet prescribed jurisdictional 'size' tests are deemed to have an EU dimension and, as such, are subject to mandatory notification under the EC Merger Regulation, irrespective of whether they have any effect in the EU. The Commission has exclusive jurisdiction over such transactions (the 'one-stop-shop' principle).

76 *United Parcel Service v. Commission (UPS)*, Case T-194/13, not yet reported.

77 See, e.g., Joaquín Almunia, International Cooperation to Fight Protectionism, 11th Annual Conference of the International Competition Network, Rio de Janeiro, 18 April 2012 (Commission Press Release SPEECH/12/280) ('It is clear that – to carry out our duties responsibly – we must strengthen our bilateral and multilateral channels of worldwide cooperation'); Andreas Bardong, former Head of Merger Control Unit, German Federal Cartel Office, Cooperation, Convergence, and ... Conflicts? The Case of EU and National Merger Control, [2013] June (2) Competition Policy International Newsletter, pp. 2–9 ('The mantra of international merger control has been co-operation, convergence, and comity'); and Patricia Brink, International Cooperation at the Antitrust Division: A View from the Trenches, 19 April 2013 (US Department of Justice), available at [www.justice.gov/atr/public/speeches/296073.pdf](http://www.justice.gov/atr/public/speeches/296073.pdf).

78 See, e.g., Regulators revolt against Telefónica and E-Plus merger, *Financial Times*, 20 June 2014 (Commission proposal to approve a transaction impacting the German telecommunications sector faced opposition from a number of Member State agencies, including the German Federal Cartel Office, but was ultimately approved (*Telefónica Deutschland/E-Plus*, Case COMP/M.7018, Commission decision of 2 July 2014)).

79 Margrethe Vestager, 'Vestager Vows to Resist Protectionism', Antitrust Politicization, September 2014, MLex Insight.

80 Margrethe Vestager, 'Independence is non-negotiable', introductory remarks at the Chatham House Competition Policy Conference, London, 18 June 2015 ('Independence is simply non-negotiable. Because we know that our legitimacy, our credibility and – ultimately – the impact of our action depend on it. ... Independence means enforcing the rules impartially without taking instructions from anyone').

Concentrations that fall below the EC Merger Regulation's thresholds may be subject to national merger control rules. Any Member State may ask the Commission to allow its national competition agency to review a concentration that has an EU dimension. One or more Member State agencies may also refer to the Commission concentrations that would otherwise be subject to national competition rules. As of 1 May 2004, parties to a concentration may petition the Commission either to have a transaction that is reportable at the EU level referred to one or more national competition agencies or to have the Commission review a transaction that would ordinarily be subject to national merger control rules.

The EC Merger Regulation contains deadlines for the Commission's review of reportable concentrations, although those deadlines have been progressively extended and, particularly in complex cases, the Commission often encourages merging parties to engage in lengthy pre-notification discussions and may 'stop the clock' to secure more time. The large majority of concentrations are approved at the end of an initial 25 working day review period (Phase I). Where the Commission has 'serious doubts' about a concentration's compatibility with EU competition rules, it opens an in-depth (Phase II) review that lasts 90 working days, extendable to 125 working days. Both periods may be extended in situations where commitments are offered to address competition concerns identified by the Commission. Absent a derogation, reportable concentrations may not be implemented until they have been approved, and, in cases of breach, the Commission may take remedial action. Fines may also be imposed for failure to notify, late notifications, or the provision of incorrect or misleading information.

The EC Merger Regulation provides opportunities for both merging parties and third parties to be heard. The Commission encourages customers, competitors, suppliers, and other interested parties to play an active role in the EU merger control process. In practice, third parties play an important role in EC merger proceedings and the Commission attaches considerable importance to their views.

The substantive test under the EC Merger Regulation is whether a concentration 'significantly impedes effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'. The Commission's appraisal under the EC Merger Regulation has two main elements: definition of the relevant market and competitive assessment of the concentration. The Commission generally focuses first on unilateral exercises of market power and then on whether a concentration may have coordinated effects arising from tacit collusion. Horizontal mergers (i.e., those involving firms active in the same market) have accounted for the large majority of challenged transactions, although the Commission has also examined (and, on occasion, has prohibited) concentrations that have had anticompetitive vertical or conglomerate effects.

The Commission is not empowered to exempt or authorise, on public interest or other grounds, concentrations that are considered incompatible with the common market. It may, however, take positive account of efficiencies. The Commission may also condition its approval of transactions on undertakings or commitments offered by the merging parties.

An appraisal under Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements, may also be warranted under the EC Merger Regulation in respect of full-function joint ventures that give rise to spill-over effects between their parent companies. Non-full-function joint ventures fall outside the EC Merger Regulation and may be subject to Articles 101 or 102 of the TFEU, which prohibits abusive conduct by dominant companies, as well as national competition rules.

Although the EU has an administrative system of merger control, where the Commission investigates and adjudicates, Commission decisions are subject to judicial review by the EU courts, whose contribution to EU merger control has been significant, particularly in recent years, where several Commission decisions have been subject to far-reaching review.

Since its adoption, the EC Merger Regulation has evolved into an integral part of EU competition practice. Unlike other areas of EU competition law, where few formal decisions have been adopted,<sup>81</sup> the EC Merger Regulation has produced a rich and extensive jurisprudence that provides guidance on a range of issues, including the competitive assessment of a wide variety of transactions affecting a broad array of product and geographic markets. The Commission has also adopted a pragmatic, open and informal approach to the EC Merger Regulation's application. Former Commissioner Monti explained the Commission's achievement under the EC Merger Regulation in the following terms:

*The EC Merger Regulation, far from standing in the way of industrial restructuring in Europe, has facilitated it, while ensuring that it did not result in damages to competition. It has provided a 'one stop shop' for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions here in the EU. It has guaranteed that merger investigations are completed within tight, pre-determinable deadlines; a remarkable degree of transparency has been maintained in the rendering of decisions – each and every merger notified to the Commission results in the communication and publication of a reasoned decision. Above all, we have put in place a merger control system which is characterised by the complete independence of the decision-maker, the Commission, and by the certainty that mergers will be exclusively assessed for their impact on competition.<sup>82</sup>*

Between September 1990, when it entered into force, and 31 December 2016, the Commission had rendered around 6,300 decisions, of which around 5,600 (88 per cent) approved concentrations unconditionally in Phase I; 55 (1 per cent) found the EC Merger Regulation to be inapplicable; 273 (4 per cent) approved transactions subject to undertakings given in Phase I;<sup>83</sup> 58 (1 per cent) approved transactions unconditionally during Phase II; and 120 (2 per cent) approved concentrations subject to undertakings given in Phase II. As of May 2017, the Commission had rendered 27 prohibition decisions, representing less than 0.5 per cent of all notified concentrations, five of which have been overturned on appeal by the EU courts.<sup>84</sup> Around 175 notifications have been withdrawn, of which 40 were withdrawn following the opening of Phase II investigations, in many instances to

81 For perspective, since the EC Treaty came into force in 1965, the Commission has rendered approximately 100 decisions applying what is now Article 102 of the TFEU, which prohibits abusive conduct by dominant companies.

82 Mario Monti, Merger Control in the European Union: A Radical Reform, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002 (Commission Press Release SPEECH/02/545).

83 Since 1 March 1998, the Commission has had explicit authority to condition decisions rendered at the end of the initial investigative period on commitments.

84 *Airtours plc v. Commission (Airtours)*, Case T-342/99 EU:T:2002:146; *Schneider Electric v. Commission (Schneider)*, Case T-310/01 EU:T:2002:254; *Tetra Laval v. Commission (Tetra Laval)*, Cases T-5/02 and T-80/02 EU:T:2002:264, upheld by the Court of Justice in *Commission v. Tetra Laval B.V. (Tetra Laval CJ)*, Case C-13/03 EU:C:2005:88; *MCI v. Commission (MCI)*, Case T-310/00 EU:T:2004:275; and *United Parcel Service v. Commission (UPS)*, Case T-194/13 EU:T:2017:144.

avoid prohibition decisions. Thus, around 1 per cent of all transactions notified under the EC Merger Regulation have been either prohibited or abandoned in the course of Phase II. The Commission's 'challenge rate' is broadly comparable to those of other major jurisdictions.<sup>85</sup> The Commission has referred 216 concentrations in whole or in part to Member State authorities (3 per cent of all notified concentrations).<sup>86</sup>

In the 26 years since it entered into force, the Commission's application of the EC Merger Regulation has evolved considerably. Eight aspects of this evolution may be identified: (1) the EC Merger Regulation's scope of application has been broadened to include all full-function joint ventures, as well as mergers, acquisitions, and other forms of concentration; (2) the Commission has over time employed an increasingly rigorous, quantitative, and economically orientated approach to market definition and substantive assessment; (3) the Commission has applied the EC Merger Regulation's substantive test to a wide array of situations, including conglomerate mergers, vertical transactions, and situations of collective dominance; (4) the Commission has used interpretative notices to codify the law and bring greater transparency; (5) the Commission has developed a flexible and open-minded approach to the implementation of the EC Merger Regulation's procedural rules, extending the review periods far beyond those originally envisaged; (6) the Commission has devoted time, effort, and resources to shaping and enforcing remedies; (7) the Commission has attached increasing importance to requesting and reviewing internal documents; and (8) the Commission has fostered international cooperation and convergence in merger control.

The most significant challenge to the Commission's role as investigator, prosecutor, and judge in EU merger control occurred in the early 2000s, when the EU courts overturned three prohibition decisions in a trilogy of judgments that were critical of the Commission's handling of the concentrations in question (*Airtours*,<sup>87</sup> *Schneider*,<sup>88</sup> and *Tetra Laval*<sup>89</sup>). The principal criticism made was that the same Commission officials assess the evidence, state the case against a notified concentration, determine how far that case is proved, and decide

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85 For perspective, of the 15,246 transactions notified in the United States between fiscal years 2006 and 2015, 'second requests' for additional information were issued in 471 instances (3 per cent). It should be noted, however, that the filing thresholds in the United States are quite low, despite having been raised from US\$50 million to US\$75.9 million as of January 2014 (see Federal Register Vol 79, No. 15, 3814). Therefore, US notifications are filed for a large number of relatively insignificant transactions that are not likely to be of interest to US regulators. See, e.g., Gavin Robert, Merger Control Procedure and Enforcement: An International Comparison, [2014] December, *European Competition Journal*, pp. 523–549.

86 See Commission website at <http://ec.europa.eu/competition/mergers/statistics.pdf> for a statistical review of the Commission's decisional practice.

87 *Airtours plc v. Commission (Airtours)*, Case T-342/99 EU:T:2002:146.

88 *Schneider Electric v. Commission*, Case T-310/01 EU:T:2002:254. This case was decided concurrently with *Schneider Electric v. Commission*, Case T-77/02 EU:T:2002:255. The two cases are collectively referred to as '*Schneider*.'

89 *Tetra Laval B.V. v. Commission*, Case T-5/02 EU:T:2002:264. This case was decided concurrently with *Tetra Laval B.V. v. Commission*, Case T-80/02 EU:T:2002:265. The two cases are collectively referred to as '*Tetra Laval*.'

whether to approve or prohibit a transaction. A comparison was drawn with the United States,<sup>90</sup> where the prospect of independent judicial review is said to exert discipline on decision making, irrespective of whether a given transaction is challenged or abandoned.<sup>91</sup>

In response to the judgments in *Airtours*, *Schneider* and *Tetra Laval*, the Commission acknowledged that ‘the system put in place in 1990 [was] showing some signs of strain’<sup>92</sup> and recognised that a ‘radical’<sup>93</sup> package of measures was needed to allay criticism, ensure that future decisions would be based on firm evidence and solid investigative techniques that could be tested against ‘the cold metal of economic theory,’<sup>94</sup> and maintain the existing institutional framework in which the Commission approves or prohibits mergers.<sup>95</sup> The Commission expressed determination that ‘these setbacks [should not be allowed] to distort our view of the Community’s merger control policy,’ and resolved to ‘transform them into an opportunity for even deeper reform than originally envisaged.’<sup>96</sup> In December 2002, the Commission approved a ‘comprehensive merger control reform package, which is intended to deliver a world class regulatory system for firms seeking approval for their mergers and acquisitions in the Community.’<sup>97</sup>

By ensuring that decisions rendered following the 2004 reforms were increasingly well reasoned and firmly based in fact, law, and sound economics, the Commission successfully preserved its power to vet mergers. Commission officials also welcomed the European Court of Human Rights’ determinations in *Jussila*<sup>98</sup> and *Menarini*<sup>99</sup> that, given the effective judicial oversight exercised by the EU courts, the Commission’s combined role as prosecutor, investigator, and decision-maker in antitrust proceedings, including merger control proceedings,

90 See, e.g., Donna Patterson and Carl Shapiro, ‘Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons’, 17 *Antitrust*, Fall 2002, p. 18 (‘The most fundamental process difference between the U.S. and EU system is the fact that U.S. authorities must obtain an order from an independent judicial authority prior to blocking a transaction. By contrast, the Competition Commission plays the role of investigator, prosecutor and judge in each transaction that it reviews’).

91 See, e.g., William J. Kolasky, ‘Conglomerate Mergers and Range Effects: It’s a Long Way from Chicago to Brussels’, George Mason University Symposium, Washington, D.C., 9 November 2001, available at <http://www.usdoj.gov/atr/public/speeches/9536.pdf>. (‘If we decide in the U.S. to challenge a merger, we know we may have to go to court to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition. This means that we know our witnesses will be exposed to the crucible of cross-examination before an independent fact-finder .... After just six weeks at the agency, I cannot overstate how much knowing we may have to prove our case to an independent fact-finder disciplines our decision-making’).

92 Mario Monti, ‘Europe’s Merger Monitor’, *The Economist*, 9 November 2002.

93 Philip Lowe, Future Directions for EU Competition Policy, International Bar Association, Fiesole, Italy, 20 September 2002 (‘we will propose radical changes in areas where radical changes are needed’).

94 JA Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Brothers, 1942).

95 See too Mario Monti, ‘Europe’s Merger Monitor’, *The Economist*, 9 November 2002, who summarised the objectives of the Commission’s proposals as follows: ‘[T]o improve the Commission’s decision-making process, making sure that our investigations of proposed mergers are more thorough, more focused, and—most importantly—more firmly grounded in sound economic reasoning, with due regard for the rights of the merging partners and of third parties.’

96 Mario Monti, ‘Merger Control in the European Union: A Radical Reform’, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002 (Commission Press Release SPEECH/02/545).

97 Commission Press Release IP/02/1856 of 11 December 2002.

98 *Jussila v. Finland*, Application No. 73053/01, judgment of 23 November 2006.

99 *Menarini Diagnostics v. Italy*, Application No. 43509/08, judgment of 27 September 2011.



is compatible with Article 6 of the European Convention on Human Rights, which provides that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.’<sup>100</sup> Should, however, complaints resurface about the perceived absence of checks and balances on Commission decision making and the lack of effective judicial review, the EU’s institutions might again be under pressure to consider further reforms.

#### IV OTHER STRATEGIC CONSIDERATIONS

Over the last decade, the Commission has pursued various initiatives designed to increase coordination, facilitate convergence and avoid divergent outcomes with other agencies around the world. Perhaps the most important of these is an agreement between the EU and the United States that was intended to promote cooperation between their respective competition agencies.<sup>101</sup> This agreement has led to high-level dialogue at political, senior management, academic level, convergence on jurisdictional, substantive, and procedural issues.<sup>102</sup> In the great majority of recent cases, the Commission has avoided diverging from its US counterparts, and antitrust enforcement has evolved from ‘comity to cooperation to convergence.’<sup>103</sup> The importance of facilitating cooperation and minimising differences has been widely recognised in the EU and the United States. Then-Competition Commissioner Joaquín Almunia recognised that ‘at the beginning of the 21st century we cannot afford to operate, to enforce our competition laws in national or regional silos.’<sup>104</sup>

The last significant disagreement between the Commission and US agencies occurred in 2001 in connection with the *General Electric/Honeywell* transaction.<sup>105</sup> The US Department of

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100 See too Wouter PJ Wils, ‘The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in which the European Commission Acts both as Investigator and as First-instance Decision Maker’, *World Competition Law and Economic Review* (Kluwer Law International 2014, Volume 37 Issue 1), pp. 5–25.

101 Agreement between the government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (1995 O.J. L95/47).

102 See, e.g., Joaquín Almunia, former Competition Commissioner, ‘Trends and Milestones in Competition Policy since 2010’, AmCham EU’s 31st Annual Competition Policy Conference, Brussels, 14 October 2014 (Commission Press Release SPEECH/14/689) (Commission disclosed it had ‘cooperated with other agencies in around half of [its] past significant merger cases’). See also Margrethe Vestager, ‘Merger review: Building a global community of practice’, ICN Merger Workshop, Brussels, 24 September 2015 (‘At present, the European Commission has some form of cooperation with non-EU agencies in more than half of all cases that involve remedies or require in-depth reviews – what we call ‘second phase’).

103 John Parisi, Counsel for European Competition Affairs in the Office of International Affairs of the US Federal Trade Commission, *Cooperation among Competition Authorities in Merger Regulation*, [2010] 43 Cornell Int’l L.J., pp. 55–72. See too Frédéric Jenny, Substantive Convergence in Merger Control: An Assessment, [2015] 1 *Law & Economics – Concurrences*, pp. 21–41.

104 Joaquín Almunia, former Competition Commissioner, ‘Cooperation and Convergence: Competition Policy in the 21st Century’, International Competition Network Annual Conference, Istanbul, 27 April 2010 (Commission Press Release SPEECH/10/183).

105 Case COMP/M.2220, Commission decision of 3 July 2001. In 2000, Senators DeWine and Kohl had written to then-Commissioner Monti, voicing concerns that the Commission’s competition policy might discriminate against US companies and suggesting that the EU might be influenced by ‘pan-European protectionism rather than by sound competition policy.’ Professor Monti dismissed the concerns as being ‘wholly unfounded’ and provided a breakdown of transactions challenged by the Commission, showing that, of the 13 concentrations that had been prohibited as of October 2000, only one had involved a US company.

Justice concluded that, subject to certain divestitures in those areas where the merging parties did compete, the transaction would not harm competition. The Commission, however, prohibited the transaction, prompting criticism from US politicians and regulators.<sup>106</sup> This disagreement represented the most significant divergence between Commission and US regulators since *Boeing/McDonnell Douglas*.<sup>107</sup> Since then, the Commission and the US agencies have endeavoured to avoid similar disagreements and the years following *General Electric/Honeywell* have been characterised by 'quiet and business-like cooperation'.<sup>108</sup>

In practice, counsel and companies should assume that antitrust agencies will, as a matter of course, cooperate in investigating transactions subject to parallel review. Counsel and companies should therefore ensure that submissions made in different jurisdictions are consistent. The differences between EU and US reporting obligations and, in particular, the lack of any requirement that companies notifying transactions to the US agencies take a position on market definition or provide a competitive assessment of a given transaction, makes it essential that US counsel are aware of, and in agreement with, notifications filed in Brussels. As a result, a premium is increasingly placed on achieving a level of cooperation and coordination between lawyers similar to that likely to occur between reviewing agencies.

## V OUTLOOK & CONCLUSIONS

The Commission's application of the EC Merger Regulation is widely considered to have been a success. Although there will inevitably be legal and practical developments, including advances in forensic tools and economic modelling, that shape its future application, the EC Merger Regulation is an increasingly mature legal instrument. At least as importantly, Commission practice has developed to a point where counsel are generally able to predict with reasonable certainty the analytical framework that will be applied in any given case, the economic and other evidence that will likely be considered probative, the duration of the Commission's review, and the probable outcome.

The challenge for the Commission will be to maintain the standards that have characterised the EC Merger Regulation's application to date; to continue to identify ways in which the administrative burden placed on notifying parties can be reduced, thereby expediting merger review and avoiding unnecessary (and costly) data gathering; to explore the scope for approving more transactions without the need for lengthy, motivated decisions, thereby freeing resources for complex cases; to avoid the temptation to extend the EC Merger Regulation's jurisdictional ambit to the acquisition of non-controlling minority shareholdings; to encourage the harmonisation of national rules and procedures; and to continue to render sensible, well-reasoned decisions substantiated by sound data and hard evidence.

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106 A former senior US regulator characterised the divergent results as reflecting an 'absolutely fundamental disagreement' between the US and EU authorities (Charles A James, International Antitrust in the Bush Administration, Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada, 21 September 2001), while another described the Commission's decision as 'not strongly grounded in economic theory or empirical evidence' (William J Kolasky, 'U.S. and EU Competition Policy: Cartels, Mergers, and Beyond', Council for the United States and Italy, 25 January 2002).

107 Case IV/M.877, Commission decision of 30 July 1997.

108 Mario Monti, 'Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: An EU Perspective', UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Los Angeles, 28 February 2004 (Commission Press Release SPEECH/04/107).

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In 2015, *Global Competition Review* ranked Mr Bock as one of the top, young antitrust lawyers in its 40 Under 40 Survey and in 2017, *Who's Who Legal* recognises Mr Bock as a 'Future Leader' in its 2017 global industry rankings for competition law.

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Mr Levy has extensive experience in notifying mergers and joint ventures under the EU Merger Regulation and UK Enterprise Act, coordinating the notification of international transactions, and advising on all aspects of antitrust law, including anti-cartel enforcement, collaborative arrangements, vertical agreements, and unilateral conduct. Over the past 25 years, he has been involved in numerous matters before the European Commission, the UK Competition and Markets Authority, the EU courts in Luxembourg, and the UK Competition Appeal Tribunal.

Consistently recognised by *Chambers* as one of the leading antitrust lawyers in Europe, Mr Levy was a finalist in *Global Competition Review*'s 'Lawyer of the Year Award' in 2012 and 2017. Nominated as one of the 'Top 10 Antitrust Lawyers Globally' by Legal Media Group's *Guide to the World's Leading Lawyers*, he was named *Global Competition Review*'s 'Dealmaker of the Year' in 2015, 'Competition Lawyer of the Year' at the ILO Client Choice Awards in 2010, and 'Competition Lawyer of the Year' by *Who's Who Legal* in 2009.

Mr Levy has written and spoken widely on a broad array of European competition law issues, and has authored a two-volume treatise entitled *European Merger Control Law: A Guide to the Merger Regulation*, published by LexisNexis. In 2015, he was awarded the 'Best Antitrust Business Article (Mergers Category)' by the Concurrences Antitrust Writing Awards.